

Claimant appealed that Award alleging a substantial portion of the funds (approximately \$137,000) withdrawn upon her termination did not constitute retirement

funds. Rather the funds were from a profit-sharing plan, and therefore not subject to the statutory offset.

Respondent alleged the Award accurately concluded the true nature of the account being that of a retirement benefit. And as such, those funds would offset any work disability award as provided by the statute. Thus, respondent requested the Award be affirmed.

When the offset issue was considered, the Board concluded the terms “retirement benefits” and “profit sharing” were not synonymous.¹ The Board went on to conclude that a “retirement benefit” was a benefit paid by reason of age and/or years of service.”² After considering the evidence presented, the Board found the profit sharing plan which generated the funds at issue did not constitute a retirement plan under K.S.A. 44-501(h). The plan was funded solely with respondent’s profits and there were no guaranteed contributions nor any guaranteed benefit. An employee’s age or years of service are not factors in the amount of money contributed or the amount ultimately paid. Accordingly, the Board reversed the ALJ’s conclusion that the statutory offset applied and remanded the matter “for the determination of the remaining issues, including claimant’s entitlement to a work disability pursuant to K.S.A. 1999 Supp. 44-510e.”³

Once the matter was remanded, respondent filed a motion to re-open the record.⁴ In spite of claimant’s objection, the ALJ granted respondent’s request and the record was opened.⁵ The only evidence offered was the deposition of James Overman, a lawyer in respondent’s employ, taken on September 19, 2003. This testimony provided no insight into the work disability issues. Rather, the sole purpose of his deposition was to bolster respondent’s contention that the liquidated proceeds of the profit-sharing account were nothing other than a retirement benefit.

Following consideration of this additional testimony, the ALJ issued his Order on October 14, 2003 reaffirming his prior conclusion. This Order did not comply with the Board’s March 17, 2003 directive. It did not address the remaining issues framed by the parties at the regular hearing. Instead, the Order recited the information provided by Mr. Overman as to the specifics surrounding the profit sharing plan. The ALJ then concluded, as he had in his earlier Award, that “the employer’s profit sharing plan is a ‘retirement plan’

¹ Order (Mar. 17, 2003) at 4.

² *Green v. City of Wichita*, 26 Kan. App. 2d 53, 977 P. 2d 283, rev. denied 267 Kan. 888 (1999).

³ Order (Mar. 17, 2003) at 4.

⁴ Motion (filed Mar. 21, 2003).

⁵ ALJ Order(May 28, 2003) at 1.

for the purposes of K.S.A. 44-501(h) and the claimant's award is limited to her functional impairment."⁶

Understandably, claimant appealed this October 14, 2003 Order. Claimant contends the ALJ erred in not properly following the Board's directive within its March 17, 2003 Order, and also in concluding she was limited to a functional impairment pursuant to K.S.A. 44-501(h). In addition, claimant argues that the Board's Order as to the retirement offset was a final order and, therefore, respondent's right to revisit the statutory offset issue was a matter to be taken up with the Court of Appeals rather than to re-litigate the matter before the ALJ.

Respondent maintains the ALJ appropriately reconsidered the statutory offset issue in connection with his analysis of the nature and extent of claimant's impairment and urges the Board to, once again, affirm the ALJ's Order.

CONCLUSIONS OF LAW

"The 1993 Kansas Legislature saw fit to include as a part of the de novo review authority of the Board, the authority to remand a matter to the ALJ."⁷ The Board has concluded this authority should be used sparingly.⁸ In this instance the Board considered the ALJ's findings and reversed that portion of the Award relating to the statutory offset. The matter was then remanded for purposes of determining the remaining issues.

Once the matter was remanded, the ALJ had no authority other than to effectuate and implement the Board's mandate as set forth in its Order remanding the case. Although this issue is one of first impression in the context of a workers compensation claim, there is significant precedent for this rule.⁹ Here, the ALJ was authorized solely to consider the nature and extent of claimant's impairment, particularly the work disability pursuant to K.S.A. 44-510e(a). He was not, however, authorized to revisit the statutory offset issue. That matter had been decided by the Board and any further proceedings by the ALJ were directed to be made in a manner consistent with the Board's findings. Accordingly, the Board finds that the October 14, 2003 Order must be reversed and this matter must be

⁶ ALJ Order (Oct. 14, 2003) at 2.

⁷ *Neal v. Hy-Vee, Inc.*, __ Kan. __, 81 P. 3d 425 (2003)

⁸ *Thomas v. Manor Care Nursing Center*, No. 193,777, 1995 WL 715359 (Kan. WCAB Nov. 22, 1995).

⁹ *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 32 P. 3d 1212 (2001) "When a district court decision is reversed and remanded for further proceedings, the district court is obliged to effectuate the mandate from the appellate court and may not consider additional matters not necessary to implement the ruling of the appellate court."

remanded to the ALJ for a determination exclusively as to the remaining issues, including claimant's entitlement to a work disability pursuant to K.S.A. 1999 Supp. 44-510e.

The Board further finds the ALJ exceeded his jurisdiction in reopening the record for additional and allowing testimony on the issue of the statutory offset. Thus, the additional evidence, specifically that of Mr. Overman's testimony as well as any exhibits offered exclusively during the course of his deposition, are excluded from any further consideration by the ALJ during the pendency of this claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order Upon Remand, entered by Administrative Law Judge Brad E. Avery, dated October 14, 2003 is hereby reversed and the matter is remanded to the ALJ for a determination of the remaining issues consistent with the above findings and conclusions. The deposition testimony of James Overman is hereby stricken from the record and shall not be considered for purposes of determining the issues presented in this claim.

IT IS SO ORDERED.

Dated this _____ day of March, 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Perry L. Franklin, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director